Supreme Court, U.S.
FILED
AUG 10 1989
JOSEPH F. SPANIOL, JR.
CLERK

NO. 88-1835

In The

Supreme Court Of The United States

October Term, 1988

STATE OF FLORIDA,

Petitioner,

vs.

MARTIN LESLIE WELLS,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

PETITIONER'S BRIEF OF THE MERITS

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August 12, 1989

QUESTION PRESENTED

Where a law enforcement agency maintains instructions requiring a comprehensive and detailed inventory for all impounded cars, but closed containers are not specifically dealt with, do these types of instructions permit an impounding officer to search and inventory closed containers?

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OPINIONS BELOW

The opinion of the Supreme Court of Florida is reported at 539 So.2d 464 (Fla. 1989) (JA. 248-263). This opinion was entered on rehearing and the original opinion was withdrawn and is not reported, except at 13 F.L.W. 686 (Fla. Dec. 1, 1988). (JA. 264-279).

The opinion of the District Court of Appeal of Florida, Fifth District is reported at 492 So.2d 1375 (5th DCA, 1986). (JA. 280-287).

The trial court's order denying the motion of Respondent, MARTIN LESLIE WELLS to suppress evidence is not reported. (JA. 22).

JURISDICTION

The Supreme Court of Florida's opinion on rehearing was filed on March 2, 1989. This Court has jurisdiction. 28 U.S.C. 1257(3). On April 27, 1989, Florida filed a petition for writ of certiorari, which this Court granted on June 19, 1989.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Amendment IV, United States Constitution, provides, in pertinent part:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause ...

Amendment XIV, Section 1, United States Constitution provides, in pertinent part:

> ...nor shall any state deprive any person of life, liberty, or property, without due process of law...

Article I, Section 12, Florida Constitution, provides:

> The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, and against the unreasonable interception of private communications by any means, shall not be violated. No warrant shall be issued except upon probable cause, supported by affidavit, particularly describing the place or places to be searched, the person or persons, thing or things to be seized, the communication to be intercepted, and the nature of evidence to be obtained. This right shall be construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court. Articles or information obtained in violation of this right shall not be admissible in evidence if such articles or information would be inadmissible under decisions of the United States Supreme Court construing the 4th Amendment to the United States Constitution.

STATEMENT OF THE CASE

Respondent, MARTIN LESLIE WELLS ("Wells"), was the respondent in the Supreme Court of Florida. The facts of this case, as set forth in the decision below, are as follows:

> While driving a car loaned by a friend, respondent was stopped by the highway patrol for speeding. The trooper noticed the smell of alcohol upon respondent's breath and arrested him for driving under the influence. At this time, respondent agreed to accompany the trooper to the station to take a breathalyzer test.* When respondent asked if he could retrieve a coat from the automobile, the trooper agreed, but accompanied respondent to the vehicle. At this point, the trooper saw an amount of cash lying on the car's floorboard. 492 So.2d at 1375-76.
>
> Suspicious of the cash's origin, the trooper asked respondent to open the trunk of the car. Respondent agreed, stating that he did not know what was in the trunk. However, neither respondent nor the trooper were able to manipulate a special

locking mechanism that opened the trunk only when the key was pushed in and turned simultaneously. Giving up the effort, the trooper told respondent that the automobile must be impounded and received permission to force the trunk open if necessary and look inside. The trooper did not ask for or receive permission to look in the passenger compartment. *Id.* at 1376.

The car subsequently was transported to a facility under contract with the state, where a search was conducted. During the search, two marijuana cigarette butts were found in an ashtray. The trooper, assisted by others, opened the trunk with the key and found a locked suitcase inside. Under the direction of the trooper, employees of the facility attempted to pry open the suitcase with a knife. Some ten minutes later they succeeded, and found a garbage bag inside containing a large amount of marijuana. *Id.*

Respondent was charged with possession of a controlled substance. After his motion to suppress the contraband was denied at trial, respondent pled nolo contendere, but reserved his right to appeal on the suppression issue. The Fifth District later determined that the trial court had erred, and ordered the contraband suppressed. *Id.* at 1375, 1378. From this order, the state now seeks review. (JA. 248-249).

* A test later showed that respondent's blood alcohol content was below the legal limit. *Wells v. State*, 492 So.2d 1975, 1876 n.1, (Fla. 5th DCA 1966)

The Supreme Court of Florida accepted the State's petition for discretionary review. That court approved in part

and quashed in part the decision of the district court.[1] The Supreme Court concluded that Well's consent to search was strictly limited to the trunk and the seizure of the marijuana cigarette butts from the passenger compartment, and the marijuana from the suitcase was, on this ground, properly suppressed. The court also concluded that even though the vehicle was legally impounded, the permissible scope of the inventory search only extended to the interior of the car and not to the opening of the suitcase found in the trunk.[2] Therefore, on this ground, the court quashed that part of the district court's decision that suppressed the marijuana cigarette butts and approved the part which suppressed the marijuana found in the suitcase. (JA. 250-257).

With respect to the scope of the inventory search, the court found that *Colorado v. Bertine,* 479 U.S. 367, 107 S.Ct. 738, 93 L.Ed.2d 739 (1987), required the suppression of the marijuana found in the closed suitcase. According to the court, *Bertine* requires that there be specific policies regarding the scope of an inventory search. Such policies are required to limit the impermissible discretion a police officer has when it is his decision whether or not to open a closed container. The court, relying on part of Footnote 6 of *Bertine,* found the foregoing to be a clear holding of the *Bertine* Court. Footnote 6 states:

> We emphasize that, in this case, the trial court found that the police department's procedures

1 The Supreme Court of Florida's opinion on rehearing modified its original opinion only by finding that the seizure of the marijuana cigarette butts discovered during the inventory search of the passenger compartment was constitutional. The Court did not modify its holding that the scope of the inventory search did not extend to closed containers without a standardized policy on the subject.

2 The court's opinion validated an inventory search of the interior of the vehicle, without differentiating between the passenger compartment and the trunk. The court's rationale, however, accepts the validity of the inventory search of the trunk, but not of the closed containers found within the trunk.

> *mandated the opening of closed containers and the listing of their contents.* Our decisions have always adhered to the requirement that inventories be conducted according to standardized criteria.

(Quoted in JA. 255). (Florida Supreme Court emphasis).

In applying this interpretation, the court found that the Florida Highway Patrol did not have a standard procedure that mandated the opening of all containers found during an inventory search. The failure to have such a policy placed impermissible discretion with the police, and therefore the opening of the suitcase violated *Bertine*. (JA. 255-256).

The dissent found that the majority's interpretation of *Bertine* was overly restrictive and erroneous. (JA. 259). The purpose of an inventory search is: to protect the owner's property; to protect the police against claims over lost and stolen property; and to protect the police from potential dangers. *South Dakota v. Opperman,* 428 U.S. 364, 96 S.Ct. 3092, 49 L.Ed.2d 1000 (1976). (JA. 259). The Florida Highway Patrol's manual was designed to meet these purposes when it made the impounding officer liable for the vehicle, its parts and contents; and instructed the impounding officer to inventory all articles in the vehicle. (JA. 260). The dissent also concluded that when a legitimate impoundment is made and standard police instructions mandate that an inventory be conducted, the scope of the inventory encompasses the entire vehicle and its contents. (JA. 260). Specific guidelines delineating the scope of the search are not required under *Bertine,* as long as there is a standard policy that all impounded vehicles be inventoried, and the reasons for the policy are consistent with the three purposes of the inventory search set forth in *Opperman* and reiterated in *Bertine*. (JA. 260-261). Therefore, the dissent would have entirely quashed the district court's decision and would have reinstated the conviction. (JA. 262).

SUMMARY OF ARGUMENT

It is well settled that inventories of impounded vehicles are reasonable where the process is aimed at securing or protecting the car, its contents or the police. *South Dakota v. Opperman,* 428 U.S. 364, 373, 99 S.Ct. 3092, 3099, 49 L.Ed.2d 1000, 1007 (1976). Such searches are unreasonable and therefore violative of the Fourth Amendment when used as a ruse to conduct an investigatory search. *Colorado v. Bertine,* 479 U.S. 367, 371-372, 107 S.Ct. 739, 741, 93 L.Ed.2d 739, 745 (1987).

To insure that the decision whether or not to conduct an inventory search is not left to the unfettered discretion of the police, and thereby violative of the Fourth Amendment, there must be a policy which requires that all impounded vehicles be subject to an inventory search. This procedure will prohibit police from simply searching those vehicles which they believe might contain evidence of criminal activity. Further, such a requirement would foster the administrative and safety needs which encompass inventory searches.

When police are constitutionally required to inventory every impounded vehicle, they should be given the discretion to determine the scope of the search. This discretion, in order to be constitutionally sanctioned, must be reviewed by an objective standard. This objective standard, similar to that implemented by this Court in *Delaware v. Prouse,* 440 U.S. 648, 654, 99 S.Ct. 1391, 1396, 59 L.Ed.2d 660, 667-668 (1979), would permit review of police conduct without taking the subjective considerations of the police into account. This would permit the police flexibility in achieving the administrative and safety concerns of an inventory search since it would allow the police to open closed containers whenever there are sufficient objective facts to support the conclusion that the search was for a legitimate purpose. To hold other-

wise, would bind the police to search either all or none. This lack of permissible discretion would negate the police's ability to determine the proper action under the particular circumstance.

An application of the foregoing standards to the instant case would establish that the Florida Supreme Court erred when it determined that the scope of the inventory search did not extend to the locked suitcase. The objective factors present, the cash on the floor of the car and the marijuana cigarette butts in the ashtray, definitely lead to the reasonable conclusion that, as a result of a drug deal, either money or weapons were located in the suitcase.

ARGUMENT

Introduction

This Court first recognized the inventory search exception to the warrant requirement in *South Dakota v. Opperman,* 428 U.S. 364, 96 S.Ct. 3092, 49 L.Ed.2d 1000 (1976), holding that the contents of vehicles taken into police custody may be inventoried without a warrant, probable cause or reasonable suspicion. *Opperman* identified three justifications for the inventory exception: protection of the owner's property while it is in police custody; protection of the police against claims of lost or stolen property; and protection of the police from danger. *Id.,* 428 U.S. at 369, 96 S.Ct. at 3097, 49 L.Ed.2d at 1005. These justifications were reiterated in *Bertine,* 479 U.S. 367, 372, 107 S.Ct. 738, 741, 93 L.Ed.2d 739, 745-746. These strong governmental interests are sufficient to justify a routine inventory of the contents of impounded vehicles.

The Supreme Court of Florida, relying on *Bertine,* upheld the inventory search of the interior of the car, but invalidated the inventory search of the closed suitcase. The court

reasoned that since the Florida Highway Patrol did not maintain a specific standardized policy regarding the opening of closed containers discovered in the car during lawful inventory searches, the scope of the search could not extend to closed containers. The court concluded that without a specific policy covering the subject, impermissible discretion was given to the searching officer to determine in all situations, whether or not to open a closed container. The court specifically relied on Footnote 6 of *Bertine*:

> We emphasize that, in this case, the trial court found that the police department's procedures *mandated the opening of closed containers and the listing of their contents.* Our decisions have always adhered to the requirement that inventories be conducted according to standardized criteria.

(Quoted in JA. 255). (Florida Supreme Court emphasis).

The issue before the Court is whether *Bertine's* requirement that inventories be conducted according to standardized criteria is satisfied by a policy requiring all impounded cars be inventoried and a procedure which permits discretion, based on objective facts, in determining the scope of the inventory search. This brief will show that *Bertine's* standardized criteria were designed to restrict inventory searches solely to look for evidence of criminal activity and, therefore, a requirement that all impounded vehicles be inventoried satisfies that criteria. This brief will then show that once a valid inventory search is undertaken, the scope of the search, based on objective facts, is within the exercise of police discretion. The search is constitutional when the objective facts show that it was reasonable to search the item for administrative or safety concerns.

I. WHEN A LAW ENFORCEMENT AGENCY MAINTAINS INSTRUCTIONS REQUIRING A COMPREHENSIVE AND DETAILED INVENTORY FOR ALL IMPOUNDED CARS, BUT CLOSED CONTAINERS ARE NOT SPECIFICALLY DEALT WITH, THESE TYPES OF INSTRUCTIONS PERMIT IMPOUNDING OFFICERS TO SEARCH AND INVENTORY CLOSED CONTAINERS.

A. A policy which requires that all impounded cars be inventoried satisfies the standard criteria required by *Bertine* to insure that the inventory search is not conducted solely to uncover evidence of criminal activity.

After Wells' vehicle was lawfully impounded, (JA. 257), an inventory search was conducted in the passenger compartment and the trunk. (JA. 255-256). The car was inventoried in accordance with the Florida Highway Patrol's written rules which require that the vehicle, its parts and contents are to be searched and inventoried. (JA. 288,290). During the search of the trunk, the suitcase was located and was pried open for inventory purposes. (JA. 249).

The Florida Supreme Court suppressed the marijuana, finding that the scope of the inventory search did not extend to the opening of closed containers. (JA. 256). The Court held:

> In the absence of a policy specifically requiring the opening of closed containers found during a legitimate inventory search, *Bertine* prohibits us from countenancing the procedure followed in this instance. The police under *Bertine* must mandate either that all containers will be opened during an inventory search, or that no containers will be opened. There can be no room for discretion. Since this record reveals no such mandatory policy, we must hold that the opening of the luggage in this instance violated *Bertine*.

(JA. 256).

The Florida Supreme Court's holding is based on Footnote 6 of *Bertine,* and is erroneous since its interpretation resulted in an overly restrictive misapplication of the law to the facts. *Bertine* does not condemn all forms of police discretion, but only that discretion which is exercised on the basis of suspicion of criminal activity and is utilized to search for evidence of criminal activity.

> ...Nothing in *Opperman* or *Lafayette* prohibits the exercise of police discretion so long as that discretion is exercised according to standard criteria and on the basis of something other than suspicion of evidence of criminal activity. Here, the discretion afforded the Boulder police was exercised in light of standardized criteria, related to the feasibility and appropriateness of parking and locking a vehicle rather than impounding it. There was no showing that the police chose to impound Bertine's van in order to investigate suspected criminal activity.

Bertine, 479 U.S. at 375, 107 S.Ct. at 743, 93 L.Ed.2d at 748 (Footnote omitted).

The Florida Highway Patrol's Forms and Procedures Manual, is designed to eliminate the "evidentiary" discretion prohibited by *Bertine.* Chapter 16, Section 16.00.00 provides:

Purpose of Vehicle and Property Receipts

In the course of duty on a day to day basis, *it is necessary for the protection of the Trooper and the Department to inventory vehicles being towed and/or stored.* Vehicles which are towed as a result of an accident, abandoned, seized, incident to an arrest, or otherwise detained in storage, and *not in the possession of the owner becomes the responsibility of the impounding officer. The officer is liable for the vehicle, its parts and contents.* Therefore, for the protection of the officer and the Department, the following forms and instructions have been developed for the Trooper to inventory and make a record of vehicle and private property on an inventory sheet that will also serve as a receipt with (1) a copy for the Department, (2) a copy for the towing company, (3) a copy of release, (4) a copy for the impounding officer, and (5) a copy for the owner/or driver. The same amount of copies of the Property Receipt with the same designation will be provided.

(JA. 288). (Emphasis supplied). Section 16.01.00 provides that inventory forms are to be used *any* time a vehicle is impounded. (JA. 288). Section 16.02.00 requires that an officer, when completing the inventory and vehicle storage receipt, list an inventory of *all articles* in the vehicle and gives examples thereof. (Emphasis supplied). (JA. 290). The inventory form requires that the officer list enumerated and unenumerated equipment as well as property found in the vehicle. (JA. 293).

Florida submits that the foregoing regulations requiring all impounded vehicles to be inventoried satisfy the standard criteria necessary to prohibit the "evidentiary" discretion denounced in *Bertine*. By requiring an inventory search

of all impounded vehicles and extending the scope to all articles anywhere in the vehicle, the Florida Highway Patrol's policy prohibits its officers from exercising the unfettered discretion to conduct detailed searches on only those vehicles which they have a suspicion that evidence of criminal activity will be found. It is this discretion, Florida submits, that is the focus of Footnote 6 of *Bertine* and not the discretion to open closed containers found during lawful inventory searches.

B. A procedure which permits the scope of the inventory search to be determined by the objective facts is in accordance with the administrative and safety interests of inventory searches.

When a police agency's policy requires that all impounded vehicles be inventoried, the police officer conducting the inventory must have the discretion to determine the exact scope of the search. This rule would implement the well settled principle that inventory searches are reasonable where the process is aimed at securing or protecting the car, its contents, and the police, from both theft and dangerous instrumentalities. *South Dakota v. Opperman,* 428 U.S. at 369, 96 S.Ct. at 3097, 49 L.Ed.2d at 1005. Such searches are unreasonable only when used as a ruse to conduct an investigatory search. *Colorado v. Bertine,* 470 U.S. at 371-372, 107 S.Ct. at 741, 93 L.Ed.2d at 745. Florida submits that the scope of an inventory search's lawfulness under the Fourth Amendment must be determined by the facts as applied to an objective standard.

The objective standard of reviewing the reasonableness of police conduct under the Fourth Amendment is well known to this Court. In *Delaware v. Prouse,* 440 U.S. 648, 654, 99 S.Ct. 1391, 1396, 59 L.Ed.2d 660, 667-668 (1979), this Court

noted that "the permissibility of a particular law enforcement practice is judged by balancing its intrusion on the individual's Fourth Amendment interest against its promotion of legitimate governmental interests. Implemented in this manner, the reasonableness standard usually requires, at a minimum, that the facts upon which an intrusion is based be capable of measurement against 'an objective standard'...." *See also, Terry v. Ohio,* 392 U.S. 1, 16, 80 S.Ct. 1860, 1877, 20 L.Ed.2d 889, 903 (1968).

The objective standard provides a starting point from which to determine if the exercise of police discretion, in a given situation, exceeds constitutional bounds. The action would be reasonable if found to have an administrative or safety motivation, as opposed to evidentiary one. If the object searched is customarily used by most people to carry valuable items, or might reasonably contain a dangerous device which threatens the personal safety of the officer, then it is more probable that the officer has stayed within the bounds of constitutional discretion. However, if an objective observer would conclude that the only legitimate purpose for opening a container found in a vehicle could have been to find evidence of criminal activity, the opening of the container would be an illegal search. As this Court noted in *Illinois v. Lafayette,* 462 U.S. 640, 647, 105 S.Ct. 2605, 2610, 77 L.Ed.2d 65, 71 (1983) "[i]t is immaterial whether the police actually fear any particular package or container; the need to protect against such risks arises independent of a particular officer's subjective concerns."

In view of the multitude of vehicles and property which come into the custody of law enforcement agencies, some discretion to determine the scope of the search is essential. On any given day, law enforcement officers impound vehicles as a result of abandonment, recovery from theft, traffic accidents, discovery of contraband, or a custodial arrest. These vehicles include automobiles, trucks, tractor-trailers,

passenger vehicles with a trailer in tow, and commercial vehicles.

The property located within such vehicles obviously runs the gamut from personal items to inventory. An agency cannot possibly draft a policy which takes into consideration every circumstance that may be encountered by an officer. Policies may be drafted, such as section 16.00.00 of the Florida Highway Patrol Forms and Procedures Manual which generally address the procedures that a trooper should follow after a vehicle is impounded. As in the present case, these procedures are fleshed out "in the field" by officers under the guidance of their supervisors. (JA. 260).

Taken to its logical extreme, the blind application of a policy by officers without any consideration of the circumstances defeats the purpose of the inventory search. If an officer must open and inventory every closed container, such as a U-Haul trailer containing a family's belongings, a commercial trailer transporting perishable inventory, or Christmas packages that have been taped and wrapped, the agency is not able to balance the intrusion to the motorist against the agency's needs to protect the property and the police and to deter false claims. Opening containers in these circumstances will not necessarily protect the property and the police and will certainly encourage claims against the agency.

The objective facts, as seen by the officer, must determine to a degree the scope of the search regardless of the specificity of the policy. If the search is merely a pretext for an investigation, it should be considered unreasonable. However, if in light of the facts, a caretaking function has been performed, such as protecting the property, protecting the safety of the police or the public, or preventing claims, an inventory search should be upheld.

This point was implicitly recognized by the Florida Supreme Court with regard to the impoundment of the vehicle. The court held that it was reasonable to impound the vehicle because of the large amount of currency that was discovered by the trooper. (JA. 257).

For the same reason, it logically follows that the officer should have inventoried the suitcase to determine if other currency or valuables were present. Upon discovering the currency, the trooper acted reasonably by opening the suitcase rather than leaving it unprotected with the vehicle at the storage yard, contents unknown. The same facts which justified the impoundment in this case, should also justify the inventory search.

The implication of the ruling by the Florida Supreme Court is that an officer's discretion is permissible in an impoundment if the impoundment is reasonable, but that any discretion in conducting an inventory renders the inventory search unreasonable. The courts, consequently, will be placed in the role of drafting law enforcement policies rather than determining the reasonableness of police conduct.

Accepting the Florida Supreme Court's interpretation of *Bertine* would, in effect, establish a bright line test for constitutionally sanctioned conduct under the Fourth Amendment. This would directly contravene this Court's rule that "[t]he test of the reasonableness of conduct under the Fourth Amendment is not capable of precise definition or mechanical application. In each case it requires a balancing of the need for the particular search against the invasion of personal rights that the search entails. Courts must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for investigating it and the place in which it is conducted." *Bell v. Wolfish,* 441 U.S. 520, 559, 99 S.Ct. 1861, 1884, 60 L.Ed.2d 447, 481

(1979). Therefore, only a case by case determination, based on the objective facts, can establish whether the discretion used in delineating the scope of the search was within constitutional bounds.

C. By requiring that the Florida Highway Patrol inventory procedures specifically address closed containers, the Florida Supreme Court has devised rules requiring a different procedure, in contravention of this Court's holding in *Bertine*.

By focusing exclusively on the wording of Chapter 16 of the Florida Highway Patrol Policy Manual and Chapter 16 of the Florida Highway Patrol Forms and Procedures Manual, the Florida Supreme Court has ignored the central issue of whether the inventory procedures followed by the trooper in this case were reasonable. If the decision of the Florida Supreme Court is allowed to stand, inventory policies and procedures may be freely second-guessed by the courts. Any court reviewing an inventory search could substitute its penmanship for that of the law enforcement agency. Policies and procedures are written by agencies to guide law enforcement officers in the performance of their duties. As a result of the decision by the Florida Supreme Court, a law enforcement agency, such as the Florida Highway Patrol, will be required to tailor its inventory policies to the whims of the courts.

Such a result runs afoul of *Bertine*. This Court reiterated in *Bertine* the well-settled principle that "a single familiar standard is essential to guide police officers ...", 475 U.S. at 375, 107 S.Ct. at 743, 83 L.Ed.2d at 748. If the opinion of the Florida Supreme Court stands, officers will not benefit from such a standard. Instead, they can expect repeated challenges to the wording of inventory policies as the measure

of their conduct. The role of courts is to determine the reasonableness of police conduct and not drafting law enforcement policies.

Moreover, by holding that the regulations of the Florida Highway Patrol must mandate the opening of closed containers in order for a search of such a container to be lawful, the Florida Supreme Court has overlooked this Court's conclusion that:

> [R]easonable police regulations relating to inventory procedures administered in good faith satisfy the Fourth Amendment, even though courts might as a matter of hindsight be able to devise equally reasonable rules requiring a different procedure.

Bertine, 477 U.S. at 364, 107 S.Ct. at 742, 93 L.Ed.2d at 747. (Footnote omitted).

Dissatisfied with the specificity of Chapter 16 of the Florida Highway Patrol Policy Manual, the Florida Supreme Court has essentially offered its version of how the inventory procedures should be written. This exercise of judicial hindsight is precluded by *Bertine*.

CONCLUSION

For the foregoing reasons, the decision of the Florida Supreme Court should be reversed and the cause remanded to the Florida courts for further proceedings.

Respectfully submitted,

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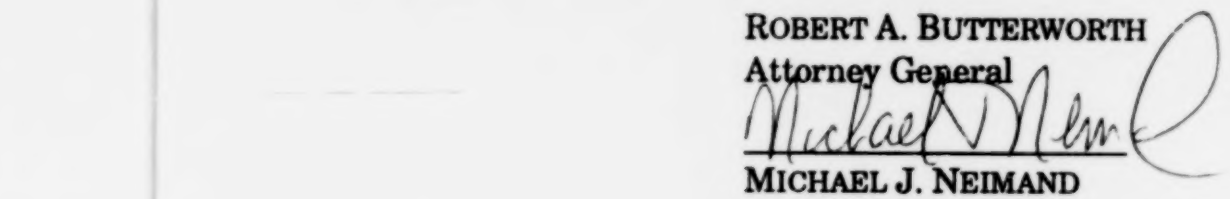

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